Supreme Court, U.S.
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No. 01-721

IN THE
Supreme Court of the United States

NORMAN M. ROBERTSON, *et al.*,
Appellants,

v.

LARRY BARTELS, *et al.*,
Appellees.

On Appeal from the United States District Court for the District of New Jersey

MOTION TO DISMISS OR AFFIRM

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MOTION TO DISMISS OR AFFIRM

This appeal arises from the second of two cases that were filed last spring challenging a statewide legislative redistricting plan adopted by the New Jersey Apportionment Commission. In the first case, filed on behalf of all the Republican members of the New Jersey Legislature as well as various individual voters, a three-judge district court conducted a full trial, doing so on an expedited basis due to impending primary elections. It then rejected the plaintiffs' central claim that the legislative plan violated section 2 of the Voting Rights Act, 42 U.S.C. § 1973, because it lowered the percentages of African-American voters in three districts in the Newark area while adding some African-American population to a neighboring district, District 34. *See Page v. Bartels*, 144 F. Supp. 2d 346 (D.N.J. 2001). The *Page* court held that such unpacking was not harmful to the interests of African-Americans in light of the relatively high degree of white "crossover" voting in legislative elections in New Jersey. *Id.* at 364-65.

In this second case, filed a few days before the *Page* trial by two incumbent Republican legislators from District 34 and several other individuals, the plaintiffs did not invoke the Voting Rights Act or the rights of African-Americans. Instead, they relied primarily on this Court's *Shaw v. Reno* line of cases, claiming that the Apportionment Commission had acted with unconstitutional, predominantly racial motives when it chose to disperse African-American voters from three Newark-area districts into four, thus increasing the percentage of African-American voting-age residents in District 34 from 3.9% to 35.3%. The three-judge court granted summary judgment to the defendants, ruling that there was no evidence supporting the claim that race was a predominant factor, subordinating other traditional redistricting criteria, particularly given the undisputed evidence (1) that the Commission gave careful consideration to other criteria, (2) that the changes being challenged increased the *integration* of white and African-American New Jerseyans, and (3) that the challenged District 34 – far from being suspiciously irregular in shape – *was built entirely of whole towns*. J.S. App. 30a-32a.

This Court should either dismiss the appeal, if it agrees with appellees that the notice of appeal was untimely filed, or summarily affirm a ruling that was entirely correct on the merits.

STATEMENT OF THE CASE

A. Adoption of the Challenged Redistricting Plan.

The New Jersey Legislature consists of a State Senate with 40 members and a General Assembly with 80 members. The same districts are used for both bodies, with one Senator and two Assembly members elected in each district.

Pursuant to the New Jersey Constitution, an Apportionment Commission (hereinafter "the Commission") was appointed following the 2000 census. *See* N.J. Const. art. IV, § 3, ¶ 1. The Commission originally consisted of five Democrats and five Republicans, selected by the parties' state political chairs. When the Commission was unable to approve a new districting plan by majority vote, the Chief Justice of the New Jersey Supreme Court was constitutionally authorized to appoint an eleventh member, and she selected Larry M. Bartels, a professor of politics and public affairs at Princeton University.

The plan eventually supported by Professor Bartels was the product of extensive study, consultation, and negotiation with all ten original members of the Commission. Assisted by former New Jersey Supreme Court Justice Robert L. Clifford, Professor Bartels studied numerous competing plans and negotiated with both sides about his specific concerns with the proposed maps. In deciding which plan to select, Professor Bartels balanced a number of redistricting principles, including compactness, respect for political subdivisions, partisan fairness, responsiveness, avoidance of voter disruption (in other words, the ability of voters to support, or oppose, their current representatives), and compliance with the Constitution and section 2 of the Voting Rights Act. The factors taken into account by Professor Bartels are summarized in his certification provided to the district court in *Page v. Bartels*:

> 6. Based on Justice Clifford's advice, I understood that federal law prohibited any redistricting plan that gave minority voters less opportunity than non-minority voters to elect their preferred candidates to the New Jersey Legislature. Therefore, in the process of evaluating competing redistricting maps, I paid close attention to racial and ethnic data and electoral opportunities.

> 7. *However, those were not my sole considerations. I also paid close attention to several other criteria, including* (1) minimizing the population deviations among the districts, as required by the "one person, one vote" rule; (2) keeping each of the forty districts contiguous; (3) keeping each of the forty districts reasonably compact; (4) respecting municipal boundaries by not splitting any towns other than Newark and Jersey City (which are too large to fit in one legislative district); (5) respecting voting-district [precinct] boundaries; (6) avoiding any bias in the map that might favor one political party over the other in an election year when the two parties were tightly competitive; (7) ensuring that some seats were competitive so that the composition of the Legislature would be responsive to shifts in votes from one party to the other; and (8) minimizing voter disruption, so as not to deny too many New Jersey citizens the opportunity to vote for incumbents who had served them well or against incumbents who had not done so.

Bartels Cert. ¶¶ 6-7, J.S. App. 54a-55a (emphasis added).[1]

Chief among Professor Bartels' concerns in weighing the merits of the parties' competing plans were the issues of partisan bias and voter disruption. Indeed, these criteria were critical factors in convincing Professor Bartels to select the Democratic plan over the Republicans' proposal. As Professor Bartels explained at the *Page* trial, after he worked extensively with both sides to come up with a plan, both parties submitted versions that Professor Bartels felt "were generally similar" with respect to a number of redistricting issues, including minority representation. Tr. 374. Professor Bartels concluded, however, that the Democratic plan was superior on the issues of voter disruption and partisan bias, and as a result, he decided

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[1] Professor Bartels' certification is reprinted at J.S. App. 52a-66a.

to vote for the Democratic plan. Professor Bartels testified as to the basis of his determination to vote for the final Democratic Plan:

> Q. Can you tell us why you decided at that point in time to come to cast a vote?
>
> A. Yes. Because the H-20 version [the Republican Plan] as I just tried to describe, seemed to me to be inferior to the plan that the Democrats had on the table. The revised version of H-20, when we analyzed that, turned out to be, I think, a significant step backward *especially with respect to partisan bias*. And I became convinced that it was quite unlikely that we would be able to end up with a satisfactory plan within the general framework proposed by [the] Republicans. At the same time, with the Democrats having accepted most of the concessions that we had suggested, it seemed to me that the Democratic map on the table was not only superior to all the other maps that we had seen up to that point, but also was quite satisfactory in absolute terms with respect to these various criteria.

Tr. 375 (emphasis added). Professor Bartels elaborated further on his decision:

> The criteria of voter disruption had to do with how many citizens would have an opportunity to vote for or against their current incumbents and so one of the things we calculated with respect to each of the proposals was an estimate of how many people would live in the same district with the three incumbents that they currently had, or with two of those incumbents, or with one of those incumbents. The calculation for the plan that was adopted was that 66 percent of the people in the state would have an opportunity to vote for or against the same three

> incumbents. The corresponding figure for the Republican plan, H-20 I believe, was in the neighborhood of 57 or 58 percent.
>
> The calculation with respect to partisan bias had to do with trying to figure out what the composition of the legislature would be in the case that voters across the state divided their votes evenly between candidates of the two parties. The criteria essentially was that in the case of a 50/50 vote, the composition of [the] legislature should be evenly divided between the two parties, and that as the voting pattern shifted away from 50/50 in either direction, the composition of the legislature should also shift correspondingly.

Tr. 376-78.[2]

The issue of minority representation focused almost exclusively on four districts. Under the 1991 apportionment plan, the City of Newark and several surrounding towns in Essex County were placed into three districts, Districts 27, 28, and 29. The voting-age population of these districts ranged from 48.2% to 57.4% African-American and from 68.6% to 79.1% combined "minorities." *Page*, 144 F. Supp. 2d 346, 352 n.8 (D.N.J. 2001). In legislative elections, the districts regularly gave 80% or more of their vote to Democratic candidates (most of whom were African-American). *Id.* at 361. Under the 1991 plan, District 34 consisted of nearby Passaic County towns, with predominantly Republican voters, and had

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[2] As it turned out in the 2001 election, Professor Bartels' assessment of partisan fairness proved correct. For example, in Senate races, the statewide vote totals were very close, with Democratic candidates winning just a few votes more than Republican candidates. The New Jersey Senate is now evenly divided, 20 to 20. *See*, Mark Perkiss, *Bartels: Map Fair to Both Parties*, Trenton Times, Nov. 19, 2001, at A1.

an African-American voting-age population of 3.9%. *Id.* at 352-53 n.8.

Because of the demographics of Districts 27, 28 and 29, it was broadly perceived that some substantial change was required to achieve a more equitable allocation of both Democratic votes and minority votes, viewed from a statewide perspective. The plan offered by the Democrats, which was eventually adopted by Professor Bartels and the Commission, dispersed, or "unpacked," the heavily concentrated, Democratic-leaning minority populations in Districts 27, 28, and 29. As a result, the percentage of African-Americans decreased somewhat in Districts 28 and 29, decreased more significantly in District 27, and increased significantly in District 34. *Id.* Specifically, under the Democrats' proposed plan, several Essex County municipalities with large African-American populations were combined with several Passaic County towns with overwhelmingly white voting populations to create a new District 34 with an African-American population of 35.3%. *Id.* Under the competing plan proposed by the Republicans, Districts 27, 28, 29, and 34 would have retained roughly the same demographic makeup as in the 1991 plan, *id.* at 354, thus preventing the achievement of a fairer partisan balance in the map.

Having determined that the Republicans' plan was inferior on the issues of partisan bias and voter disruption, and having assured himself that the Democrats' plan gave minorities voting opportunities at least equal to those offered in the Republicans' plan, Professor Bartels concluded that the Democratic plan best met the various redistricting principles informing his decision. The Democratic plan (modified to meet several of Professor Bartels' concerns) was thus approved by a six-member majority, certified by the Commission on April 11, 2001, and filed with the Secretary of State on April 12, 2001.

B. The *Page v. Bartels* Litigation.

On April 12, 2001, the Republican members of the New Jersey Legislature, along with several registered voters, filed their complaint challenging the Commission's plan in *Page v. Bartels*, in the United States District Court for the District of New Jersey. As Republican legislators, appellants Robertson and Zecker were among the plaintiffs in the *Page* suit.[3] The *Page* complaint asserted four claims: (1) that the Commission's plan would dilute minority voting power and thus "infringe plaintiffs' rights as protected by § 2 of the Voting Rights Act of 1965"; (2) that the Commission intentionally violated section 2; (3) that in adopting the new plan the Commission violated the plaintiffs' rights to due process and equal protection under the Fourteenth Amendment; and (4) that the plan violated the Fifteenth Amendment. *See Page*, 144 F. Supp. 2d at 349-50.

Following resolution of procedural issues not relevant to this matter, a three-judge panel was appointed pursuant to 28 U.S.C. § 2284 to preside over the *Page* litigation. The panel consisted of Circuit Judge Leonard I. Garth and District Judges Dickinson R. Debevoise and Harold A. Ackerman. The panel convened a trial on all claims and defenses on April 30 and May 1, 2001. After receiving evidence and hearing testimony from both sides' witnesses and experts, the court rejected the plaintiffs' argument that section 2 required the Commission to adopt the Republican plan, which essentially retained the

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[3] The plaintiffs listed in the *Page* complaint included "the State Senate Republican Majority" and the "Assembly Republican Majority." The complaint described the plaintiffs as including Republican "citizens of the State of New Jersey who have been duly elected as Senators/Assemblymen from previously constituted legislative districts and currently serve in the New Jersey Legislature and comprise the majority of each of the respective houses." *See* J.S. App. 7a n.1.

majority-minority Districts 27, 28, and 29 created under the 1991 plan. Concluding that the "dissolution of majority-minority districts does not constitute a *per se* violation of § 2," *Page*, 144 F. Supp. 2d at 363, the court looked at the totality of circumstances to determine whether the new plan violated section 2. Because the evidence did not show that voting in these districts was so racially polarized as to defeat minority voting strength, the court concluded that the reduction of the number of African-American voters in District 27 and the dispersal of African-American voters to other districts, including District 34, would not "impair or prevent minorities from electing their chosen representatives." *Id.* at 366.

The court also rejected the plaintiffs' constitutional claims. Of particular relevance to this case, the court in *Page* held that

> [r]ace *per se* was not the predominant motive in the approval of the Bartels plan. Rather, the Bartels plan was adopted based on a variety of factors, most notably the doctrine of political fairness, Constitutional and statutory requirements, and the concerns of minorities. Thus, we hold that the evidence is not sufficient to support a claim for violation of the Equal Protection Clause.

Id. at 368.

C. Disposition of Appellants' Claims.

This case was filed three days before the *Page* trial began. The complaint set forth two causes of action that are relevant here, described by the District Court as follows:

> first, that the proposed District 34 'was constituted with a race-based outcome as the predominant consideration to the subordination of traditional principles of redistricting' in violation of the Fourteenth and Fifteenth Amendments

> to the United States Constitution; [and] second, that the Commission engaged in purposeful unconstitutional racial discrimination by adopting a redistricting plan that favored certain incumbent minority legislators.

J.S. App. 8a (quoting plaintiffs' complaint).[4]

A new three-judge panel was appointed on May 7, 2001, consisting of two of the judges on the *Page* panel – Judges Ackerman and Debevoise – plus Circuit Judge Morton I. Greenberg. By agreement of the parties, the preliminary and permanent injunction proceedings were consolidated, and the trial record in *Page* was incorporated into the record on the plaintiffs' claims in this case. J.S. App. 9a.

Appellees moved for summary judgment. In their opposition to appellees' motion, appellants relied almost exclusively – as they do in this Court – on statements made in the *Page* litigation by Professor Bartels indicating that he considered minority voting opportunities along with other redistricting principles in selecting between the parties' competing maps. *See* J.S. at 5-6; J.S. App. 99a-100a.

In its June 13 order, the three-judge court granted summary judgment for appellees on two counts of appellants'

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[4] In addition to Senator Robertson of District 34, plaintiffs were the mayors of Totowa and Little Falls, two Passaic County towns that were in former District 34 but would not be in new District 34, and the mayor of West Paterson, which was formerly in District 35 but would become part of District 34 under the new plan. The other plaintiffs were two individuals precluded from running for office in the new District 34 because of a state one-year residency requirement. These two individuals also asserted a challenge to the one-year residency requirement. That claim was referred by the panel to a single judge and is not before this Court. *See* J.S. App. 9a. Assemblyman Zecker, also of District 34, intervened a few days later.

complaint. In its June 18 opinion setting forth its reasoning, the court rejected appellants' claim of racial gerrymandering, concluding that appellants' reliance on Professor Bartels' isolated statements concerning minority voting opportunities ignored the full context of the decision made by Professor Bartels and the Commission. The court thus held that

> Bartels' certification and trial testimony in *Page* clearly establish that while race was a consideration in selecting a redistricting plan, *it was not the predominant factor.* Bartels acknowledges that he considered the racial composition of the new districts, including the electoral opportunities for minority candidates. But he considered many factors other than race. As the Court in *Shaw* recognized, mere consciousness of race in redistricting is an insufficient basis on which to trigger strict scrutiny where it is considered along with traditional redistricting principles, such as compactness, contiguity and political boundaries. *See Shaw*, 509 U.S. at 646, 113 S. Ct. at 2826. Here, there is clear evidence, not [refuted] by actual facts, that in addition to racial criteria, *Bartels considered traditional redistricting principles including equal population, contiguity, compactness, respect for municipal and voting-district [precinct] boundaries, the avoidance of partisan bias, competitive[ness] and responsiveness, and the minimization of voter disruption.*

J.S. App. 30a-31a (emphasis added).[5]

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[5] The district court's original opinion contained a typographical error in the clause "not reflected by actual facts." *See* J.S. App. 31a. In an order dated June 26, 2001, the court substituted the correct word, so that the clause should read "not refuted by actual facts." *See* J.S. App. 44a.

For similar reasons, the District Court also rejected appellants' separate claim based on statements by Professor Bartels that he considered the effect of the proposed plan on the election prospects of minority *incumbents*. As with appellants' first claim, the District Court concluded that although these statements indicated that the Commission considered race in its decision to adopt the new plan, Professor Bartels and the Commission also considered protection of incumbents as a general matter, along with a host of other factors, and therefore race did not subordinate other traditional redistricting principles. J.S. App. 35a-36a.

The court further held, contrary to appellants' claims, that the boundaries of the Commission plan, and of District 34 in particular, "are hardly irregular or bizarre," and thus did not give rise to a *per se* presumption of racial gerrymandering. J.S. App. 31a. To the contrary, the plan consisted of reasonably compact districts and, consistent with state districting requirements, kept whole every municipality in the state (with the necessary exceptions of New Jersey's two largest cities, Newark and Jersey City). *Id.* The court specifically rejected appellants' argument that the creation of the new District 34 – combining predominantly white Passaic County towns with predominantly African-American Essex County towns – constituted racial gerrymandering. As the District Court noted, this kind of *integration* of voters in a district is the opposite of the kinds of districting decisions that led to this Court's *Shaw* line of cases. As the District Court observed, those cases reflect concerns about political line-drawing that *segregates* voters based on race. But those concerns, "while unquestionably legitimate, do not come into play under the Commission's plan. Indeed, the redistricting plan goes farther than traditional majority-minority redistricting plans in fighting these concerns by purposefully retaining geographically contiguous and compact boundaries at the expense of majority-minority racial composition." J.S. App. 34a.

In addition to rejecting appellants' constitutional claims on the merits, the district court granted summary judgment to appellees for the independent reason that appellants' claims were barred by the doctrine of *res judicata*, and in particular by the doctrine of virtual representation, because appellants' interests had been adequately represented by the plaintiffs in the *Page* litigation. J.S. App. 11a-21a. The court noted that as a member of the State Senate Republican Majority – the group that brought the *Page* suit – Senator Robertson was in essence a party to the *Page* litigation. J.S. App. 18a. The court found that Senator Robertson and his co-plaintiffs shared a common goal with the *Page* plaintiffs – to invalidate the redistricting plan proposed by the Democrats and to enforce a plan that maintained the boundaries of the old District 34 – and that the *Robertson* plaintiffs had engaged in tactical maneuvering to avoid adjudication of their claims by the *Page* panel. *Id.* Given the similar goals of the plaintiffs in *Page* and *Robertson*, and given the possibility that the redistricting plan raises issues of public law that could be subject to never-ending challenge if *res judicata* were not applied, the court determined that appellants would be considered in privity with the *Page* plaintiffs and that therefore their constitutional claims were barred by claim preclusion. J.S. App. 20a-21a.

REASONS TO DISMISS OR AFFIRM

I. THIS APPEAL WAS NOT TIMELY FILED.

Appellants failed to file their notice of appeal within 30 days of the District Court's order denying their applications for preliminary and permanent injunctions, as required for interlocutory appeals under 28 U.S.C. § 2101(b). As a result, this appeal must be dismissed. *See Ward v. Winstead*, 400 U.S. 1019 (1971) (summarily dismissing appeal where notice of appeal not timely filed pursuant to 28 U.S.C. § 2101(b)).

Because of the expedited nature of this case, the District Court issued an order addressing appellants' challenges to the New Jersey districting plan before it issued a full opinion. That order, filed on June 13, 2001, (1) denied appellants' application for preliminary and permanent injunctions, (2) granted appellees' motion for summary judgment on counts one and two of the complaint, and (3) referred count three of the complaint to a single judge for disposition. *See* J.S. App. 46a-47a; *see also supra note* 4. On June 18, the District Court issued its opinion "setting forth its reasons" for its June 13 order. *See* J.S. App. 9a. On June 26, the District Court issued an order changing one word in its June 18 opinion. *See* J.S. App. 44a (changing "reflected" to "refuted").

Appellants did not file their notice of appeal until July 26, 2001, thirty days after the order amending the June 18 opinion. That notice stated that appellants were appealing from the June 13 order "entered pursuant" to the June 18 opinion and June 26 corrective order. *See* J.S. App. 50a. That filing was too late, for two reasons. First, the applicable time limit was the 30-day limit for appeals from "interlocutory" orders. Second, the running of the 30 days was not triggered anew simply because the District Court corrected one word of its opinion on June 26.

Section 2101(b) provides that direct appeals to the Supreme Court authorized by law "from a decision of a district court . . . shall be taken within thirty days from the . . . order . . . appealed from, if interlocutory, and within sixty days if final." 28 U.S.C. § 2101(b). Here the order appealed from is clearly interlocutory. The District Court granted summary judgment on two counts of the complaint, denied appellants' request for injunctive relief arising from those two counts, and expressly referred the third count for disposition by a single-judge court. *See* J.S. App. 46a-47a. Because one of appellants' claims remained undecided, the District Court's order is "interlocutory." *See, e.g., Goldberg v. Cablevision*

Systems Corp., 261 F.3d 318, 324 (2d Cir. 2001) (holding that grant of summary judgment that left claims to be decided was "interlocutory" under 28 U.S.C. § 1292(a)(1)). As a result, under section 2101(b), appellants were required to file their notice of appeal within 30 days of the District Court's June 13, 2001 order.

Appellants failed to do so. Appellants did not file their notice of appeal until 43 days later, on July 26, 2001. *See* J.S. App. 43a. There can be no argument that appellants' notice of appeal was timely because it was filed within thirty days of the District Court's June 26 order correcting one word in its June 18 opinion. Here the "order . . . appealed from," 28 U.S.C. § 2101(b), is the District Court's order granting defendants' motion for summary judgment on two of the three counts of the complaint and denying plaintiffs' application for injunctive relief – its June 13 order – not its June 26 order correcting a typo. Even if the "order . . . appealed from" were the District Court's June 18 opinion setting forth its reasons for its June 13 order – which it clearly is not – appellants' notice of appeal would be untimely. The mere fact that an order "previously entered has been reentered or revised in an immaterial way does not toll the time within which review must be sought." *FTC v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 211 (1952). The "question is whether the lower court, in its second order, has disturbed or revised legal rights and obligations which, by its prior judgment, had been plainly and properly settled with finality." *Id.* at 212; *see FCC v. League of Women Voters of Calif.*, 468 U.S. 364, 373 n.10 (1984) (referring to *Minneapolis-Honeywell*'s immaterial-revision test). The District Court's June 26 order correcting a single typo in its opinion comes nowhere close to meeting the test of revising the legal rights and obligations that were clearly established by its June 13 order.

Because appellants filed their notice of appeal more than 30 days after the District Court's June 13, 2001 order, their appeal is untimely and must be dismissed. *See Winstead*, 400 U.S. at 1019.

II. THE DISTRICT COURT CORRECTLY HELD THAT THERE WAS INSUFFICIENT EVIDENCE TO JUSTIFY A TRIAL ON THE CLAIM THAT RACE PREDOMINATED OVER OTHER TRADITIONAL DISTRICTING PRINCIPLES IN THE COMMISSION'S ADOPTION OF THE NEW PLAN.

A. To Invalidate the State's Chosen Apportionment Plan, Appellants Must Satisfy a Heavy Burden.

Because appellants challenge the lines drawn by the Commission as impermissibly race-based, they face a "'demanding'" burden of proof. *Hunt v. Cromartie*, 121 S. Ct. 1452, 1458 (2001) ("*Cromartie II*") (quoting *Miller v. Johnson*, 515 U.S. 900, 928 (1995) (O'Connor, J., concurring)). They must show that the district lines "cannot be understood as anything other than an effort to separate voters into different districts on the basis of race." *Shaw v. Reno*, 509 U.S. 630, 649 (1993) ("*Shaw I*"). This Court "has specified that those who claim that a legislature has improperly used race as a criterion, in order, for example, to create a majority-minority district, must show at a minimum that the 'legislature subordinated traditional race-neutral districting principles . . . to racial considerations.'" *Cromartie II*, 121 S. Ct. at 1458 (quoting *Miller*, 515 U.S. at 916). "Race must not simply have been '*a* motivation for the drawing of a majority minority district.'" *Id.* (quoting *Bush v. Vera*, 517 U.S. 952, 959 (1996) (O'Connor, J., principal opinion)). It must be the "predominant factor." *Id.* (citations omitted).

Further, appellants must overcome the significant deference afforded to state decisions about redistricting. The State "'must have discretion to exercise the political judgment necessary to balance competing interests,' and courts must 'exercise *extraordinary caution* in adjudicating claims that a State has drawn district lines on the basis of race.'" *Id.* (quoting *Miller*, 515 U.S. at 916 (emphasis added)). Moreover, "[t]he courts, in assessing the sufficiency of a challenge to a redistricting plan, must be sensitive to the complex interplay of forces that enter a legislature's redistricting calculus." *Miller v. Johnson*, 515 U.S. 900, 915-16 (1995). That same sensitivity is also owed to a plan that is a product of a state commission established for this purpose under a state's constitution.

B. Appellants Failed to Establish that Racial Considerations Predominated Over the Other Redistricting Principles Applied by the Commission in Adopting the New Plan.

As the District Court correctly held, appellants made no showing that they could meet their "demanding" burden of proving that race so predominated in the Commission's adoption of the new plan as to justify judicial invalidation of the State's decision about how to apportion its legislative districts. Appellants point to Professor Bartels' statements that "in the process of evaluating competing redistricting maps, [he] paid close attention to racial and ethnic and electoral opportunities," Bartels Cert. ¶ 6, J.S. App. 54a-55a, that he "was determined to examine possibilities for expanding minority representation," *id.* ¶ 12, J.S. App. 57a-58a, and that he believed that the Democratic plan was "superior to GOP-H20 (or any other plan proposed by the Republicans) in terms of creating *new* opportunities for minority candidates to win seats in the Legislature." *Id.* As the District Court observed, however, these statements cannot be considered in isolation.

J.S. App. 26a. Viewed in the context of the Commission's entire decisionmaking process, the District Court concluded, these statements could not support the conclusion that race was anything more than one among many of the Commission's considerations.

In so doing, the court relied on unrebutted statements in Professor Bartels' sworn certification and trial testimony. The court noted that Professor Bartels elaborated in his certification on the effects of other criteria, including population equality, compactness, preservation of municipal boundaries, and, above all, avoiding partisan bias and voter disruption. Appellants offered no evidence to counter any of these assertions. It was thus undisputed, on this record, that Professor Bartels and the Commission applied a multiplicity of criteria in determining which plan to adopt, not limited to or predominated by racial criteria. Indeed, the panel in *Page* found that "all of the witnesses who testified about the apportionment process confirmed that Professor Bartels set out several criteria with which he was concerned, and his criticisms of each party's maps were not race-based." 144 F. Supp. 2d at 368. The court in *Page* thus held that "[r]ace *per se* was not the predominant motive in the approval of the [Commission's] plan." *Id.* Instead, the record unequivocally shows that the Commission's decision was based on a "complex interplay of forces" to which deference is owed. *Miller*, 515 U.S. at 915-16.

That racial considerations did not predominate in the drawing of the Commission plan as a whole, and new District 34 in particular, is reinforced by the fact that District 34 is compact and reasonably shaped. J.S. App. 32a. Although irregular shape is not a prerequisite to establishing a racial gerrymander, evidence as to the shape of a district is an indication whether the district was drawn merely to separate voters on the basis of race, or instead to satisfy a number of redistricting principles. *See Miller*, 515 U.S. at 913.

Appellants do not argue that District 34's boundaries are especially irregular; in fact, appellants concede that District 34, like all the districts in the new plan, does "not appear to violate the New Jersey constitutional requirements of contiguity, compactness and respect for municipal boundaries." J.S. at 8. This concession reflects the fact that District 34 consists entirely of five whole towns. This simply is not a case in which the Commission ignored traditional districting principles of compactness and contiguity and drew bizarre boundaries so as to sweep as many voters of one race as possible within one district. *See Shaw I*, 509 U.S. at 647. Quite the opposite is true: as the District Court observed, the plan "purposefully retain[s] geographically contiguous and compact boundaries at the expense of a majority-minority racial composition." J.S. App. 34a.

Appellants nonetheless suggest that race predominated in the Commission's drawing of District 34 because the new district combines heavily African-American towns like East Orange with towns "with which East Orange has little in common racially, demographically, socially or economically," and because three contiguous towns (the mayors of which are appellants in this case) will be in different legislative districts. J.S. at 9. That argument is incorrect for several reasons. First, it reflects an assumption that any change to the existing district configuration is constitutionally suspect and requires a strong justification. But there is no factual or legal support for that assumption. (In any event, as the District Court noted, the three towns represented by the appellant mayors were not all in the same legislative district even under the 1991 plan. J.S. App. 32a n.13.) Reapportionment necessarily involves change to district lines, and where, as here, the Commission adhered to New Jersey's redistricting principles of compactness, contiguity, respect for municipal lines, and the like, the fact that some districts may have a different municipal and demographic makeup does not create a cause of action.

Moreover, the changes to District 34 had the effect of integrating predominantly white communities with predominantly African-American communities, and they were undertaken in large part to increase the partisan balance in the map. As the District Court stated, such integration is fundamentally different from the concern that is at the heart of *Shaw*: the creation of districts based on the belief that voters of one race always have the same interests and cannot reach across racial lines to form other types of political coalitions. J.S. App. 33a-34a (citing *Shaw*, 509 U.S. at 647-48).

Furthermore, when, as here, racial identification correlates closely with political affiliation, the burden on a party challenging a districting plan under the *Shaw* doctrine is especially high. *See Cromartie II*, 121 S. Ct. at 1465. Here, the record discloses that African-Americans in Essex County overwhelmingly vote in favor of Democratic candidates. Thus, under the principles recognized by this Court in *Cromartie II*, appellants must establish that (1) "the [districting authority] could have achieved its legislative political objectives in alternative ways that are comparably consistent with traditional districting principles"; and (2) the "districting alternatives [put forth by the challenger] would have brought about significantly greater racial balance." *Id.* at 1466. The mere recitation of these standards enunciated by this Court in *Cromartie II* conclusively establishes the untenability of appellants' case, in light of the fact that *it is appellee's plan as adopted*, and not any alternative offered by appellants, that "[brings] about significantly greater racial balance." *Id.*

C. The Evidence that the Commission Sought to Protect Minority Incumbents Does Not Suffice to Trigger Strict Scrutiny.

Appellants' case is not materially aided by their separate argument that the Commission engaged in racial discrimination

in its treatment of incumbent legislators. This argument is premised primarily on a statement in Professor Bartels' certification that he was "determined not to adopt any plan that would significantly threaten the reelection chances of incumbent minority legislators." Bartels Cert. ¶ 12, J.S. App. 57a-58a. Appellants argue that the Professor's failure to demand the same protection for every non-minority incumbent (including the two appellant former legislators) constitutes disparate treatment. They further claim that, as to this specific form of alleged racial discrimination, the "predominant motive" test no longer applies and they can invoke strict scrutiny by pointing to evidence of *any* consideration of the race of incumbents.

This argument is flawed in many ways. To begin with, as already noted, this Court has repeatedly explained that "[s]trict scrutiny does not apply merely because redistricting is performed with consciousness of race." *Bush v. Vera*, 517 U.S. 952, 958 (1996) (O'Connor, J., principal opinion); *see also Cromartie II*, 121 S. Ct. at 1458; *Miller v. Johnson*, 515 U.S. at 916; *Shaw v. Hunt*, 517 U.S. 899, 904 (1996) ("*Shaw II*"); *Shaw I*, 509 U.S. at 646; *DeWitt v. Wilson*, 856 F. Supp. 1409 (E.D. Cal. 1994), *summarily aff'd in relevant part*, 515 U.S. 1170 (1995).[6] To the contrary, even where there is evidence that a state was aware of race when it created an apportionment map, to invalidate that map "a plaintiff must prove that the legislature subordinated traditional race-neutral districting

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[6] As they did in the District Court, appellants assume that strict scrutiny applies, and devote much of their argument to the presence or absence of a compelling state interest for the Commission's decision, relying on *King v. Illinois Board of Elections*, 979 F. Supp. 619 (N.D. Ill. 1997), *aff'd*, 522 U.S. 1087 (1998). But as the District Court noted, the *King* case on which appellants rely was on remand from this Court's determination that plaintiffs had stated a racial gerrymandering claim, and is thus inapposite to the district court's holding in this case that appellants have failed to establish a racial gerrymander. J.S. App. 25a n.10.

principles, including but not limited to compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests, to racial considerations." *Miller*, 515 U.S. at 916; *see also Bush v. Vera*, 517 U.S. at 958 (summary affirmance in *DeWitt* stands for the proposition that "strict scrutiny did not apply to an intentionally created *compact* majority-minority district") (O'Connor, J., principal opinion) (emphasis added).

There is no reason to abandon that standard merely because of a handful of statements in the record indicating an awareness of the race of incumbents, rather than just the race of voters. To begin with, the two cannot be so neatly separated. In the real world, a permissible effort to protect or enhance a minority group's electoral influence will often be described as an effort to protect or enhance the group's representation in the legislative body. But the *substance* of what is occurring will be the same.

It would be particularly unjustifiable in this case to create a rule triggering strict scrutiny based on evidence of *any* consideration of the race of incumbents. First, the Commission was engaged in an effort to relieve the undue "packing" of African-Americans and Democrats into three districts in the Newark area. That packing, the record shows, had the effect of diluting the influence of minority voters and Democratic voters statewide. In the course of addressing such a problem, however, one would naturally want to be sure that the dispersal of minority voters did not prevent the continued election of incumbents who had proved to be the candidates of choice of the minority voters in the previously packed districts. Indeed, such a concern amounts to a litmus test for when salutary unpacking turns into undesirable and unfair fragmentation of minority voters. *See Thornburg v. Gingles*, 478 U.S. 30, 46 n.11 (1986).

Second, it is undisputed that under the prior redistricting map, African-Americans were underrepresented in the New Jersey Senate, as compared to their share of the eligible population of voters. While proportional representation is not a constitutional or statutory right of minority voters, there is nothing inherently suspect about affirmative efforts to increase representation for a group that historically has been, and today continues to be, underrepresented, as long as that effort does not require subordination of other traditional and legitimate redistricting criteria. *See Miller*, 515 U.S. at 916; *cf. Gaffney v. Cummings*, 412 U.S. 735, 752-54 (1973) (Constitution permits deliberate efforts to produce political proportional representation).

Certainly there can be no argument that the District Court was required to view minority incumbent protection as a *predominant* factor in this case. After all, Professor Bartels weighed the reelection prospects of *all* incumbents in determining which plan to select. *See* Bartels Cert. ¶¶ 7, 21, J.S. App. 55a, 62a-63a. Professor Bartels believed that it was desirable "that as many New Jerseyans as possible be able to maintain – or choose not to maintain – their existing relationships with incumbent legislators." *Id.* ¶ 21, J.S. App. 62a-63a. He acknowledged that "[t]his goal conflicted, to some degree, with the goals of creating a fair, unbiased, and responsive map and building new opportunities for minority representation," but he believed that the plan ultimately adopted by the Commission "does a good job of minimizing voter disruption while satisfying other criteria." *Id.*

The District Court held that those statements, taken together, showed that although the Commission considered race when it considered minority incumbents' reelection prospects, it also considered protection of incumbents as a general matter, along with a host of other factors, and that therefore race did not subordinate other traditional redistricting

principles. J.S. App. 35a-36a. As the District Court observed, one consequence of dispersing minority voters into a larger number of districts "was that the chances for the reelection of the incumbents in those previously predominantly white districts was lessened, but this circumstance does not mean that the race of the incumbent was the predominant factor of the Commission's consideration." J.S. App. 36a. Recognizing that the Voting Rights Act "makes race a relevant factor to be considered," the court observed that "strict scrutiny is not triggered necessarily where [race] is utilized," but rather race must predominate over other traditional redistricting principles before strict scrutiny will apply. *Id.*

D. Summary Judgment Was Appropriate.

In a last-ditch effort to keep their claims alive, appellants argue that summary judgment on their constitutional claims was inappropriate, citing *Cromartie I.* J.S. at 21. In *Cromartie I*, however, the District Court granted summary judgment based solely on circumstantial evidence regarding the legislature's motive, and this Court remanded the case for the District Court to develop the factual record on whether race predominated in the legislature's redistricting decision. *Hunt v. Cromartie*, 526 U.S. 541, 547-48 (1999). In this case, by contrast, the parties explicitly agreed that the entire record from the *Page* litigation, including extensive testimonial evidence, would be incorporated into the record for summary judgment. J.S. App. 9a. As a result, unlike in *Cromartie*, the evidence included oral and written testimony by the individual casting the deciding vote to approve the new districting plan. In his certification and trial testimony, Professor Bartels elaborated on the criteria on which he had based his vote, and the interplay between those criteria. It is also worth noting that two of the judges on the *Page* panel, which observed witnesses and weighed evidence, were on the *Robertson* panel, and both panels ruled unanimously. Indeed, having heard and weighed

the evidence, the *Page* panel determined that "[r]ace *per se* was not the predominant motive in the approval of the Bartels plan. Rather, the Bartels plan was adopted based on a variety of factors, most notably the doctrine of political fairness, Constitutional and statutory requirements, and the concerns of minorities." *Page*, 144 F. Supp. 2d at 368. Likewise, based on the same substantial body of evidence, the *Robertson* panel concluded that appellants could not meet their burden of demonstrating that race subordinated other traditional redistricting principles in the Commission's decision, and that therefore summary judgment was proper. That decision was plainly correct and should be affirmed. *See DeWitt v. Wilson*, 515 U.S. 1170 (1995) (summarily affirming district court's grant of summary judgment where race did not predominate over redistricting authority's application of traditional redistricting principles).

III. THE DISTRICT COURT PROPERLY DISMISSED APPELLANTS' CLAIMS UNDER THE DOCTRINE OF *RES JUDICATA*.

Appellants initiated this lawsuit with precisely the same objectives as the plaintiffs in the *Page* litigation – to overturn the plan adopted by the Commission and restore a Republican-leaning, predominantly white District 34. In fact, two of the appellants, Senator Robertson and Assemblyman Zecker, were parties in *Page* since all Republican members of the State Senate and the Assembly were named collectively as *Page* plaintiffs. Appellants nevertheless made the deliberate, tactical decision prior to the trial in *Page* to file their own complaint rather than argue their legal theory in *Page*. The District Court correctly held that *res judicata* barred appellants from bypassing their opportunity to raise those claims in *Page* and from bringing a separate suit challenging the Commission's plan.

The application of *res judicata* (also called claim preclusion) here follows well-established principles. *Res judicata* applies when there is a showing that there has been "(1) a final judgment on the merits of a prior suit involving (2) the same claim and (3) the same parties or their privies." *EEOC v. United States Steel Corp.*, 921 F.2d 489, 493 (3d Cir. 1990); *see Rivet v. Regions Bank of La.*, 522 U.S. 470, 476 (1998). There is no dispute that the panel's ruling in *Page* was a final disposition on the merits and therefore satisfies the first element.

As to the similarity of claims at issue in the two cases, the District Court followed settled law that the inquiry is "whether there is an 'essential similarity of the underlying events giving rise to various legal claims.'" *CoreStates Bank, N.A. v. Huls Am., Inc.*, 176 F.3d 187, 194 (3d Cir. 1999) (quoting *United States v. Atholone Indus.*, 746 F.3d 977, 984 (3d Cir. 1984)); *see, e.g.*, Restatement (Second) of Judgments § 24 cmt. a (1980) ("The present trend is to see claim in factual terms and to make it coterminous with the transaction regardless of the number of substantive theories, that may be available to plaintiff; regardless of the number of primary rights that may have been invaded; and regardless of the variations in the evidence needed to support the theories or rights."); *Nevada v. United States*, 463 U.S. 110, 130 n.12 (1983) (noting "transaction" approach of Second Restatement); *Lane v. Peterson*, 899 F.2d 737, 742 (8th Cir. 1990) (claim is generally barred by *res judicata* if it arises out of the same nucleus of operative facts as prior claim).

Here there is no doubt that the claims in this suit and those in *Page* arose from the same event: the Commission's adoption of a redistricting map. The plaintiffs in both these cases sought exactly the same relief: a declaration that the plan was unlawful, and restoration of a district resembling the former District 34. The District Court correctly concluded that,

in view of these facts, the differences in the legal theories propounded by the plaintiffs were of no consequence. J.S. App. 12a; *see, e.g., Harrington v. Vandalia-Butter Bd. of Educ.*, 649 F.2d 434, 437 (6th Cir. 1981) ("a judgment on the merits operates as a bar to the later suit, even though a different legal theory of recovery is advanced in the second suit") (internal quotation marks and citation omitted); *Northern Assurance Co. of Am. v. Square D Co.*, 201 F.3d 84, 87 (2d Cir. 2000); *Costner v. URS Consultants, Inc.*, 153 F.3d 667, 674 (8th Cir. 1998); Restatement (Second) of Judgments § 24 cmt. c ("That a number of different legal theories casting liability on an actor may apply to a given episode does not create multiple transactions and hence multiple claims.").

Moreover, the fact that appellants' theories could require presentation of some evidence not offered in *Page* also does not remove them from the preclusive effect of *Page*. The "transactional" approach to *res judicata* "contemplates that there may be some variance in the proof required for claims that are nonetheless the 'same claim' for *res judicata* purposes." *Lane*, 899 F.2d at 743. The operative question in each case is whether "the claims arise out of the same nucleus of facts." *Id.* The claims here not only arose out of the same operative facts but also sought the same relief, so the District Court was clearly correct in treating them as indistinguishable.

Finally, the District Court also was correct in rejecting the argument that *res judicata* should not apply because appellants purportedly were not parties in *Page*. To begin with, two of the appellants – Senator Robertson and Assemblyman Zecker – were in fact named as parties in *Page*, as the *Page* plaintiffs included all Republican members of the State Senate and the Assembly, named collectively. If appellants did not want to be bound by that case, they should at a minimum have asked that the appearance on their behalf be withdrawn before judgment.

Moreover, this Court has recognized that privity may apply when "a person, although not a party, has his interests adequately represented by someone with the same interests." *Richards v. Jefferson County*, 517 U.S. 793, 798 (1996). Whether the relationship between the nonparty and the party to the prior adjudication is sufficiently close to justify preclusion on the grounds of adequate or virtual representation depends on several different considerations. As the District Court determined, the inquiry turns on the identity of interests between the two parties, the extent of participation in the prior litigation, apparent acquiescence, whether the present party maneuvered to avoid the effects of the first action, the adequacy of the prior representation (in terms of incentives to litigate), and whether a public or private law issue is raised. *See* J.S. App. 15a-17a (citing *Tyus v. Schoemehl*, 93 F.3d 449, 454 (8th Cir. 1996); *Mann v. City of Albany*, 883 F.2d 999, 1003 (11th Cir. 1989); and *Richards*, 517 U.S. at 803).

These considerations support the District Court's finding of adequate or virtual representation here. As to identity of interests, the District Court correctly recognized that the *Page* plaintiffs and appellants shared an interest in restoring the old configuration of districts in the Newark area, which would have produced one more Republican-leaning district. As a result of that shared interest, there was "a clear commonality of interest among all the parties: their challenge to the validity of the New Jersey redistricting plan." J.S. App. 18a.

Moreover, to decline to apply *res judicata* here would reward appellants' tactical maneuvering. Appellants were not strangers to the *Page* litigation. *Cf. Richards*, 517 U.S. at 798. Not only were all Republican legislators named as plaintiffs there, but appellants also made a deliberate choice to initiate this separate lawsuit as opposed to participating actively in *Page*. Appellants state that they brought their separate complaint "when it became apparent that certain issues would

not be addressed in the *Page* case." J.S. at 23. But there was no inevitability concerning which issues would or would not be addressed in *Page* at the time appellants initiated this suit. Had Senator Robertson and Assemblyman Zecker spoken with their attorney in *Page*, they presumably could have assured that the legal theories they propound were given a hearing. Appellants provide *no* justification for not participating more actively in *Page*; they chose to sit it out and initiate a separate challenge to the plan. In these circumstances, the District Court was clearly correct to conclude that appellants engaged in tactical maneuvering, and to allow the lawsuit would directly contravene the grounds for the preclusion doctrines. *See* J.S. App. 19a. Here, as the District Court recognized, "'[h]olding preclusion inapplicable assures that a party would not intervene, for it would allow various members of a coordinated group to bring separate lawsuits in the hope that one member of the group would eventually be successful, benefitting the entire group.'" *Id.* (quoting *Tyus*, 93 F.3d at 457).

As to the adequacy of representation, the critical issue is whether the prior party had adequate incentive to litigate. *See, e.g.*, *Tyus*, 93 F.3d at 455-56. The *Page* plaintiffs had every incentive to litigate the validity of New Jersey's redistricting plan and to raise every possible avenue of attack that they believed might succeed. Moreover, as the District Court found, "experienced and competent counsel" represented the *Page* plaintiffs. J.S. App. 19a. The fact that appellants framed their challenge to New Jersey's redistricting plan under a different legal theory does not change these facts.

The District Court also noted that this case raises issues of public law. Where the issue of public law has only an indirect effect on a private party's interest, this Court has granted lower courts "wide latitude to establish procedures . . . to limit the number of judicial proceedings." *Richards*, 517 U.S. at 803. A large number of plaintiffs potentially have standing to

challenge the composition of New Jersey's legislative districts. If the court were not allowed to enforce the preclusion doctrine, it could be faced with one challenge after another, each asserting a different legal theory to obtain the same relief. The District Court correctly concluded that the public-law character of the issues at stake weighed in favor of preclusion.

Appellants' argument that the application of *res judicata* has the effect of imposing an unfairly short "statute of limitations" on redistricting actions makes no sense. The application of *res judicata* here provides an incentive to intervene for those who are on the sidelines as their political leaders litigate a challenge to a redistricting plan, so that different legal theories may be considered in a single proceeding, as opposed to seriatim. By choosing to intervene in such a suit, a party may alter the range of issues and legal theories that the court must decide. There is no unfairness in holding appellants to the results of the litigation that they consciously chose not to join. The application of *res judicata* here follows from settled principles; it prevents rewarding plaintiffs for self-consciously staying on the sidelines and initiating a separate proceeding to air their claims. The District Court's decision that *Page* bars this suit should be affirmed.

CONCLUSION

This appeal should be dismissed as untimely or the judgment below should be summarily affirmed.

Respectfully submitted,

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